IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-70,510-04

EX PARTE JUAN EDWARD CASTILLO, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. 2004CR1461A-W2 IN THE 186TH JUDICIAL DISTRICT COURT BEXAR COUNTY

***Per curiam*. ALCALA, J., concurred. YEARY, J., did not participate.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5.[1]

In September 2005, a jury found applicant guilty of the 2003 capital murder of Tommy Garcia, Jr. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set

[1] Unless otherwise indicated, all future references to Articles are to the Texas Code of Criminal Procedure.

applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Castillo v. State*, 221 S.W.3d 689 (Tex. Crim. App. 2007).

In his initial application for a writ of habeas corpus, applicant alleged that: his trial counsel rendered ineffective assistance of counsel at voir dire, prior to trial, and at trial; his appellate counsel rendered ineffective assistance; and the trial court violated his right to self-representation and abused its discretion by allowing him to represent himself during the sentencing phase of trial. This Court adopted the trial court's findings of fact and conclusions of law, found that the claim regarding self-representation was procedurally barred, and otherwise denied relief on applicant's claims. *Ex parte Castillo*, No. WR-70,510-01 (Tex. Crim. App. Sept. 12, 2012)(not designated for publication).

On October 30, 2017, applicant filed the instant application in the trial court. This is applicant's first subsequent writ of habeas corpus application. In the application, applicant raises a single claim that his conviction and sentence are based on false testimony and, therefore, violate his right to due process.

In December 2009, this Court held in *Ex parte Chabot* that the knowing or unknowing use of false or perjured testimony violates due process. *Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). Because applicant filed his initial habeas application in the trial court prior to this Court's decision in *Chabot*, this decision, which provides a new legal basis, was not available at the time applicant filed that application. Thus, we found that applicant had met the requirements of Article 11.071 § 5(a)(1), and we stayed his

execution and remanded his application to the trial court for resolution of the claim. *Ex parte Castillo*, No. WR-70,510-04 (Tex. Crim. App. Nov. 28, 2017)(not designated for publication). The case has now been returned to this Court.

In *Ex parte Weinstein*, this Court clarified that, when an applicant asserts that his due process rights were violated by the State's use of material false testimony, this Court must first determine (1) whether the testimony was, in fact, false, and, if so, then (2) whether the testimony was material. 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). False testimony is material only if there is a "reasonable likelihood" that the testimony affected the judgment of the jury. *Id*. We review factual findings concerning whether a witness's testimony is perjurious or false under a deferential standard, but we review the ultimate legal conclusion of whether such testimony was "material" *de novo*. *Id*. at 664.

Gerardo Gutierrez testified at trial that he and applicant were held in the Bexar County Jail during the same period. During a conversation between them, applicant told Gutierrez that he and two friends had planned to rob a person, but it went awry and applicant shot the victim when he took off running. Applicant also told Gutierrez that the authorities would have a hard time convicting him because they did not have the weapon used. Gutierrez testified that, at the time of trial, he was working, he was not incarcerated, he did not have any charges pending against him, and he did not want anything from the prosecution.

However, in June 2013, Gutierrez executed a sworn declaration in which he stated

that his trial testimony regarding what applicant had told him about the crime had been untrue. He then specifically stated that "I made up this testimony to try to help myself."

Applicant now claims that this recantation shows that false testimony was admitted at his trial, which violates his due process rights. After reviewing the issue, the trial court issued findings of fact and conclusions of law and recommended that this Court deny applicant relief on his claim.

In its findings, the trial court discussed the facts of the case, this Court's holding on direct appeal, Gutierrez's 2013 affidavit recanting his trial testimony, and the actual trial testimony. These findings are generally supported by the record with two exceptions.[2] First, the record shows that the name of "Teresa Quintana" used on pages 4-6 of the findings should be "Teresa Quintero."[3] Second, the trial court states on page 6 of its findings that "Gerardo Gutierrez testified that in March 2003, he was an inmate in the same area of the Bexar County Jail as Applicant." Although this Court made the same imprecise statement in its direct appeal opinion, it is more accurate to say that Gutierrez testified that he was arrested and jailed in March 2003. And, sometime after December 2003, he met applicant, who was living in the same area of the jail. With these two corrections, we adopt the trial court's findings.

---

[2] On post-conviction review of habeas corpus applications, the convicting court is the "original factfinder," but this Court is the ultimate factfinder. *Weinstein*, 421 S.W.3d at 664 (quoting *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008)).

[3] We recognize that we made the same mistake in the opinion on direct appeal.

In its conclusions of law, the trial court noted at the outset that applicant's claim "rests on whether Gutierrez's 2013 affidavit can be considered credible." To support its determination, the trial court found that Gutierrez was not the sole source of any piece of information he provided to the jury during applicant's trial. Rather, his testimony was consistent with the testimony of Lucinda Gonzales and Bryan Anthony Brown regarding admissions they heard applicant make. Gutierrez's testimony was also consistent with the version of events set out by the two co-defendants who testified. In his 2013 affidavit, on the other hand, Gutierrez gave no explanation for how he could have independently manufactured a version of events consistent with that of multiple other witnesses while he was incarcerated in the Bexar County jail. Thus, the court concluded that Gutierrez's 2013 affidavit was not credible, and applicant had not met his burden to prove his claim.

We adopt the trial court's conclusions described above. However, we do not adopt the legal reasoning starting on line 2 of page 10 and continuing through line 3 of page 11. We also reject the speculation and legal reasoning beginning on line 11 of page 11 and continuing through line 3 of page 12. These conclusions mischaracterize applicant's claim as an actual innocence claim rather than a false testimony claim. Consequently, the trial court improperly required applicant to meet a greater burden than that which applies in this case.

When reviewing a false testimony claim, a court must determine (1) whether the testimony was, in fact, false. *Weinstein*, 421 S.W.3d at 665. If it was false, then the court

must determine (2) whether the testimony was material. *Id*. Because the trial court determined that applicant failed to prove that the testimony presented at trial was false, and because that determination is supported by the record, we need not address the materiality prong. Relief is denied.

IT IS SO ORDERED THIS THE 7th DAY OF FEBRUARY, 2018.

Do not publish